

**Internal Revenue Service**  
**memorandum**

TL-N-5206-88

CC:TL:TS/MAKEYES

date: JUN 15 1988

to: District Counsel, Denver SW:DEN  
Attn: David Monson

from: Director, Tax Litigation Division CC:TL

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subject: Statute of Limitations

This memorandum is in response to your request for technical advice dated March 31, 1988, on the interplay of the TEFRA statute of limitations, section 6229, with consents executed on Form 872-As.

Issue

Can the one year statute of limitations under section 6229(f) be validly extended?

Conclusion

We agree with your analysis of the three hypotheticals in your memorandum, however, we would have you emphasize that section 6229(f) can not be extended beyond the one year period. In your first two hypotheticals the statute is being extended under section 6501(a), not under section 6229(f). We think the draft of your technical advice does not make that point clear.

Finally, even though we agree that the consents extending the period of limitations under section 6501(a) could be sufficient to cover the converted items, we are not certain whether the Courts will uphold this position as it has not yet been litigated. As you noted in your memorandum, no recommendation should be given for extending the period of limitations beyond the one year period specified in section 6229(f).

Facts

You propose three factual situations. In the first situation, the taxpayer signs a 906 closing agreement for partnership items and a Form 872-A is also executed. You do not specify if the 872-A is unrestricted, but it appears that it is

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what you intended. Both the closing agreement and the Form 872-A were executed while the period of limitations under section 6501(a) is still open.

In the second situation, the taxpayer executes an unrestricted Form 872-A for nonpartnership items within the three year period provided by section 6501(a). Then after section 6501(a) would have expired (absent the Form 872-A), but while the statute is open under section 6229(a), a closing agreement is executed for partnership items.

In third situation, the taxpayer does not execute a Form 872-A within the time permitted under section 6501(a). The statute of limitations is open solely by section 6229(a). A closing agreement is then executed by taxpayer and the Service for partnership items. A form 872-A is then executed.

#### Discussion

It is our position that section 6229(f) can not be extended beyond the one year period. There is no specific provision in the code allowing for the extension of that section. Each of the other provisions dealing with the period of limitations have a code section providing for extension. Section 6229(a) can be extended by consent, and it is so provided in the code under section 6229(b)(1). Section 6229(a) can also be extended by a consent signed under section 6501(c)(4), if the consent specifically refers to partnership items. See section 6229(b)(2). Section 6501(a) can be extended by consent under 6501(c)(4). That section provides:

(4) Extension by Agreement - Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the secretary and taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. (emphasis added)

Section 6501(c)(4) is not made applicable to section 6229(f) by any other provision in the code.

Since section 6229(f) cannot be extended beyond the one year period specified, it may be an unnecessary risk at this time to obtain a consent under section 6501(c)(4) involving converted partnership items, which purportedly extends the statute of limitation for assessment beyond the one year period specified in section 6229(f). Although we believe an unrestricted consent obtained under section 6501(c)(4) should be sufficient to cover the converted items under section 6501(a), this position is untested in the courts. So unless we cannot assess within the one year period, we do not recommend extending the period. As we noted, at the time partnership items are converted to nonpartnership items, there are two possible periods of limitation that are applicable, section 6229(f) and section 6501(a) (to the extent that it has not expired). In your factual situations, consents are obtained and executed both within the time before section 6501(a) expires and after section 6501(a) has expired.

We agree with your analysis of the first and second situation, assuming the taxpayer signed an unrestricted consent. If the consent specified particular issues, there may be a problem with the consent applying to the converted items. Although we agree that these consents could be sufficient to extend the period of limitations under section 6501(a), we do not recommend extending the period for assessment beyond the one year period specified in section 6229(f). As you properly noted at the end of your memorandum, no court has not yet addressed the validity of such extensions and there is no point in risking loss of revenue to the Government on a position not yet tested in the Courts. We also agree that other administrative problems could be created by such extensions.

As regarding the third hypothetical, we believe that the consent obtained after the expiration of section 6501(a) is insufficient to extend the period of assessment for the converted items. As you concluded and as discussed above, there is no provision for extending the period of limitations under section 6229(f) beyond the one year provided for in the code. Therefore, assessment should be made within one year after the settlement agreement is entered into. Further, the consent will not revive the otherwise expired statute of limitations under section 6501(a).

If partner level determinations are required for affected items, then the notice of deficiency issued under section 6230(a)(2)(A) for such items should be issued within one year as provided under section 6229(f). There will be no problem with a second notice of deficiency being issued under section 6212 for the other partnership items covered by the consent. See section 6230(a)(2)(C).

Although you did not request specific advice on the language used in the Form 872-A, we would suggest that if a 872-A is used to extend the period of limitations, and there is a possibility that partnership items may be converted to nonpartnership items, the language of the form should be modified so that it will not terminate upon the issuance of a notice of deficiency issued under section 6212 (as compared to a notice issued under section 6230). Here is a suggested modification:

(1) The amount(s) of any Federal (kind of tax) tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended \_\_\_\_\_ may be assessed on or before the 90th day after: (a) the Internal Revenue Office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess tax, from the taxpayer(s); or (b) the Internal Revenue Service mails Form 872-T to the taxpayer(s); or (c) the Internal Revenue Service mails a notice of deficiency for such period(s); except that if a notice of deficiency is sent to the taxpayer(s), the time for assessing the tax for the period(s) stated in the notice of deficiency will end 60 days after the period during which the making of the assessment is prohibited; [except that such a notice of deficiency, other than one issued under I.R.C. § 6230(a)(2)(A)(i), for items relating to a specific partnership, will not operate to terminate the period for assessment for partnership items which have been or are later converted to nonpartnership items under I.R.C. § 6231(b) and affected items.] . . .

We do not recommend that the consent contain language to the effect that an extension will apply to converted partnership or affected items, as it could be interpreted that where we do not make specific reference to such items, the extension does not apply to them.

Another problem that could arise with the 872-A consents involves the period for assessment. These consents provide for 90 days to assess once the consent is terminated. Under section 6229(f) the Service has one year to assess after the partnership items become nonpartnership items. If the consent specifically made reference to the converted items, a taxpayer may argue that any assessment made past the 90 days (assuming no petition is filed), but within the one year period, would be untimely due to the Service's agreement to the terms of the 872-A. We do not think this argument would be successful, but due to the uncertainties we would recommend that if a Form 872-A is used, the modified language shown above may help avoid this problem.

Although a consent obtained by a Form 872 or 872-A may be sufficient to extend the period of limitations for converted partnership items, we do not recommend extending beyond the one year period of section 6229(f), unless absolutely necessary. It is unclear what position the courts will take on the consents and our arguments providing for the consents to be sufficient are not supported by precedent.

Should you have any questions regarding this memorandum, please contact Marsha Keyes at FTS 566-4174.

MARLENE GROSS

By:

  
KATHLEEN E. WHATLEY  
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